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## EFFORTS BY LABOR UNION TO COMPEL RECOGNITION.

In Tunstall v. Stearns Coal Co., 192 Fed. 808, decided by Sixth Circuit Court of Appeals, there was injunction preventing defendants from "hiring or employing any of the employees of the plaintiff to quit the service of the plaintiff and from hiring and paying any persons who are seeking employment of the plaintiff from engaging in the employment of the plaintiff. In other words, from bribing the employees of the plaintiff to cease work for the plaintiff, or from bribing persons who are willing and desirous and about to enter its employ from so doing." A *per curiam* opinion affirms the issuance of this injunction.

It was conceded by appellants that the acts enjoined were being done for the purpose of compelling the plaintiff to yield its position against giving "recognition" to a labor union in employment of labor. The court, premising that the record does not show any complaint by plaintiff's employees as to wages or conditions of service, says: "A concerted effort by strikers to cripple an employer by persuading his workmen away from him is an injury which requires justification, but it is permitted, because it is incidental to the full exercise of the employees' clear and established right to strike for the improvement of their own condition. Such unlawfulness as there might otherwise be in that campaign of persuasion is merged in the dominant right to promote directly their own interest by effectively carrying on their contest."

Having stated this much in behalf of labor in its "dominant right," the court then reasons that there is a difference where, not the employees, but the officials of a general labor organization, direct a strike and resort to the same means to make it effectual.

Thus it says: "In the one case, the benefit * * * is immediate and direct and its primary purpose is to improve the specific existing conditions, and the injury to the employer's business is measurably incidental. In the other, injury to the employer's business is the primary object, sought for the purpose of compelling a result said to be for the benefit of the working miners of several states grouped as a class and for the benefit of these employees of this employer only in a remote and contingent way. To say that every weapon lawful in a conflict between an employer and his workmen, over a question in which each has a personal interest, is also lawful as between him and a labor organization to which his men do not belong, is to say that capital and labor, as respective classes, are so in conflict that each has a lawful interest in injuring the other. This we are not prepared to do."

There is, and should be, a distinction between the rights of employees in efforts to improve their condition in a struggle with employers and the rights of third persons in a struggle with the same employers, whether such efforts may redound either directly or indirectly to the benefit of those employees.

Possibly it is true that the employees of an employer are fully justified in commissioning officials of a labor organization to represent them in any grievance or to secure any improvement in their condition or any advance in wages, but this commissioning could only be of those officials as individuals and it could not rightfully be exercised for any ulterior purpose. All ulterior things *non in haec foedera veniunt*, and an employer, no more than one not an employer, may not be dragged into a controversy about them by his employees or by anyone else. Nor may penalties be put upon him by employees or anyone else, if he will not treat, nor recognize anybody to treat with him, in regard to them.

In other words, while it is true that labor may organize to improve its conditions either in a general or a particular way, yet in the furthering of its general plan each

body of employees of a particular employer is the only body that sustains any relation whereby arises the "dominant right" of which the opinion speaks as justification for unlawfulness.

What we wish to stress with regard to the language we have quoted and the spirit which it suggests as pervading this opinion, is its harshness and unnecessary assumption of wrong motive actuating the officials of a labor organization, even though it be conceded that their primary purpose is to compel its recognition.

Thus take the term "bribing" as used in the order for preliminary injunction. To bribe is to commit a criminal offense. It is not conventional either, but imports moral turpitude, where it is employed in a technical way. Here it is technically wrong, but the slur of imputation is cast, when presumptively these officials were as honest in their contentions as the judge who held them untenable. This is a particularly unfortunate word in a preliminary injunction, and, if advisedly used, forecasts the decree upon the merits.

The per curiam opinion said, "injury to the employer's business is the primary object," when about six lines above it had said there was "the primary purpose of compelling recognition." A little further down the language seems the product of recklessness or inaccuracy in supposing capital and interest to be in conflict with each having "a lawful interest in injuring the other."

If there is any body of men in this country who should be exceedingly cautious and conservative in the use of terms in deciding controversies between capital and labor, it is that body of men, who may claim with more absolute basis of fact than any other officials in this country, that their positions make them independent of both. If the independence of life tenure may not bring about the calm judicial temperament which will cast no aspersions on litigants—which will not incline a judge to deal charitably with the motives of those he deems mistaken or misguided—then it is more than apt to make one unreasonable and dictatorial.

Here, as we see it, was presented a principle, which, if developed in a logical, calm, judicial way, not only would be highly educational, to the mutual benefit of labor and capital, but would also help to offset the wild spirit riding the winds of passion, in such nostrums as judicial recall.

It seems to us that the federal judiciary has a more glorious opportunity in this time than was ever presented before. By temperance in speech and action they must justify the placing of judges where, undisturbed by the prejudices and passions of the day, serenely they may seek and enforce the truth and the right.

All others in this country but they are expected and entitled to have a personal interest, as inhering in their pursuit of life, liberty and happiness, and their vision as to justice and right correspondingly may be warped. But, if life tenure in the high employment of administering justice, may not secure the best of all service, in this direction, then the cause of justice is not the constant inspiration our country needs. Indeed, the recall, if not justified, should be greatly excused.

## NOTES OF IMPORTANT DECISIONS

PROMISE OF MARRIAGE—JUSTIFIABLE BREACH BY PLAINTIFF BECOMING A CONFIRMED INVALID.—The Supreme Court of Washington lately held that where a marriage engagement was entered into the plaintiff so far as known was a strong and healthy woman, free from any physical ailments or diseases and soon thereafter became ill and was compelled to submit to a surgical operation and she continuing in ill health for more than three years, during which there were numerous postponements, defendant, her not yet recovering, was justified in withdrawing from the engagement. Travis v. Schnebly, 122 Pac. 316.

The facts in this case do not present the question fairly whether subsequent ill health and waiting a reasonable time for recovery would justify withdrawal from the engagement by either party. We conceive that the

afflicted party would have as good ground for withdrawal as the other party, if either has, because such party might not feel herself justified in throwing herself as a burden on the other or he or she might be professionally advised that the marriage ought not to take place.

But at all events, marriage is in law a civil contract contemplating reasonable performance of future duties absolutely owing to the relation that is to be entered into. When it appears by discovery after an engagement that performance such as an engagement fairly contemplates will not probably be realized, why should not the party not at fault or not afflicted be allowed to withdraw?

Decision appears, as shown by cases cited, to admit this, so far as physical ailments are concerned, but as marriage is a union which will be a failure, if confidence and mutual respect is not to exist, why should the justification for withdrawal not go beyond that?

Or considering causes for divorce, why should not even the discovery of that which would justify divorce be sufficient to justify breach of contract? Ought not these things to be, in a sense, correlative?

We said the case cited did not present the question of justification after reasonable time, because each delay upon agreement was a modification of the original promise and plaintiff impliedly agreed that if she did not recover defendant was to be released.

A rule is difficult to lay down in these cases. If there is good faith on both sides and as full recognition of the rights of the other party as that requires and yet there is ground for a well-founded belief that marriage will be a failure, withdrawal ought to be deemed justifiable. While marriage is a civil contract, it is primarily an act in the pursuit of happiness and should be so treated.

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COMITY OF COURTS — ENFORCING STOCKHOLDER LIABILITY IN STATE WHOSE PUBLIC POLICY IS OPPOSED THERETO.—The case of Converse v. Hamilton, 32 Sup. Ct. 415, in which the opinion of an unanimous court was rendered by Justice Van Devanter is a very striking illustration of the vigor of the full faith and credit clause of the constitution.

One gathers from reading the opinion that there has been a diligent, patient effort extending over several years in Minnesota to make effective a constitutional provision that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held by him." This opinion shows that this effort has been crowned with complete success.

We have not the space here to treat this very important decision as fully as it deserves, and as we shall attempt to do in our next succeeding issue, but we confine our attention to the part the full faith and credit clause plays in this success.

There were proceedings in sequestration under Minnesota statute, whereby the receiver of an insolvent corporation, upon notice by publication, obtained a decree of court fixing the percentage of assessment that should be levied upon stockholders. Upon this decree the receiver brought suit against a stockholder residing in Wisconsin.

Wisconsin Supreme Court held that such an action was for the enforcement of a remedy opposed to its public policy and affirmed the ruling of the trial court dismissing the suit. S. C. 136 Wis. 589, 118 N. W. 190.

In reversing the Wisconsin Court Justice Van Devanter said that "the Supreme Court of Wisconsin failed to give full faith and credit" to proceedings under the Minnesota sequestration statute, and that while an ordinary chancery receiver might have no right to sue outside of Minnesota, this receiver "became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere.

It seems to us that this contention was one to which objection might not be made in a forum to the public policy of which it is opposed. 22 Am. & Eng. Ency. L. 1329."

Justice Van Devanter said, as we see, that the status of the receiver was that of "quasi assignee and representative," etc., and this is a clear reason for his right to sue elsewhere. But is he immune from any objection that might be made against his principals?

The learned Justice ruled, as we interpret the decision, that, just as the faith and credit clause required full effect to be given abroad to a judgment, so all of the effect that the Minnesota court would give to this sequestration statute should be given by the courts of other states. Some effect is doubtless given by recognizing the receiver as quasi assignee, but by this decision there is something of a paradox in an assignee having a more extensive right than was in his assignor, without any principle such as obtains in regard to negotiable paper being involved.

## BACK TO MARSHALL — A PROTEST AGAINST A REVIVAL OF EXPLODED JUDICIAL FALLACIES.

It is quite refreshing to hear a voice of conservative protest arise in the West against the reactionary suggestions for the recall of judges and of decisions which do not infrequently come from the East in these piping times of political pot boiling.

Hon. Hugh H. Brown of Tonopah, in a really magnificent address on John Marshall at the last meeting of the Nevada Bar Association, of which he is the president, said some things that are very important for lawyers to understand and to make clear to the people.

It is a well-known fact that the unyielding nature of the federal constitution against which such protest is made now, was not its chief characteristic before Marshall played his truly wonderful part in crystallizing its great principles into insuperable bulwarks of liberty. On this point Mr. Brown says:

"When Marshall first came to his high seat upon the Supreme Court, the court was without prestige and almost without litigants. Justices had retired from it to accept commissions upon state courts. When Jay declined the Chief Justiceship, after his retirement, he declared that the court 'lacked public confidence and respect.' The Chief Justiceship went begging. Strong men avoided it. Marshall successively recommended it to others. He did not seek it for himself. Jay had said, 'When I left the bench I was perfectly convinced that under a system so defective the court could not obtain the energy, weight and dignity which was essential to its affording due support to the National Government.'

"Soon thereafter, Marshall accepted the commission. When he left the court a generation later, the court had become and ever since has been, the greatest tribunal in the world. He found the constitution an experiment. He perfected it. He found its fabric plastic. He left it adamant. When he pronounced his decision in Marbury's case, the recent doctrine of the French Revolution was saturating the young Republic—the doctrine of the absolute right of the people to rule. In substance, he said to Congress, to the people's delegates, 'If you enact a law in conflict with the constitution, it is utterly void. This court, though only a co-ordinate branch of the government, has a right to declare it void and to pronounce a final judgment, binding upon all people and upon all states.' And to a head of one of the executive departments, acting under the immediate orders of the president, he said, 'You, too, are subject to the mandate of the constitution; and whenever you attempt to trespass upon the right of an individual your hand will be stayed; for be it known this is a government of laws and not of men.'

"His concept was a mighty Federal government, complete with every national power. He succeeded in establishing the principle only after a struggle and in the face of bitter opposition. Threatened impeachment was hurled at the Federal judiciary, and amendments were proposed to substitute fixed terms in place of life tenure, and removal on the address of two-thirds of both Houses. Behold what a change followed in Marshall's wake, and ever since has prevailed. Now the whole nation awaits in calm patience, and receives with loyal acquiescence, every utterance of the court. This feeling was expressed, in some small measure, a few years ago by a former ambassador to the court of St. James, when he said in substance, as I now recall it:

"'Many a plain man never has seen the court nor ever expects to see it. He knows nothing of its formulas and procedure. He regards it as a remote and austere presence. Yet he feels that if ever thing should come to the worst—if oppression and wrong should gain the ascendancy and injustice stalk abroad in the land, and all else failed him; nevertheless his humble roof, and all things dear that are sheltered beneath it, would find, somehow, some way, a final refuge, protection and remedy in the Supreme Court of the United States."

It has not been infrequently proposed in recent times that a judge as well as a legislator should keep his ear to the ground in order to catch the suggestion of the popular will before rendering his decision. This was far from being the view of Marshall, who on not a few occasions dared to follow the law rather tnat the momentary whim of an excited populace. In the trial of Aaron Burr this characteristic is so plainly indicated that Mr. Brown calls prominent attention to it, saying:

"In his charge to the jury in the celebrated Burr case—and let us remember that it was in the face of a national clamor for Burr's blood—great judge that he was, great lawyer that he was, not even the roar of a nation disturbed the judicial poise nor deflected a hair's breadth the intellectual and moral courage of the man, for he gave to that jury the definition of treason as it was then prescribed by the constitution, even though it saved Burr's life; he measured the full burden of his own sense of responsibility when he said in simple, masterful

words, 'No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there be no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

Marshall attended Virginia's Constitutional Convention in the seventy-fifth year of his age. If ever a clear shaft of light was cast athwart the dark heresy of the recall of judges, it was Marshall's plea for the independence of the judiciary and tenure during good behavior, and Mr. Brown quotes that famous passage from Marshall's address to that convention which should be set forth in letters that glow until the conviction of the great jurist shall become the fundamental maxim of American judicial independence.

Judge Marshall said: "Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a juryman or a judge if he has one dollar of interest in the matter to be decided; and will you allow a judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man? And will you make me believe that, if the manner of his decision may affect the tenure of that office, the man himself will not be affected by that consideration? I have always thought, from my early youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."

Summing up the obligations which as lawyers we owe to Judge Marshall, Mr. Brown in the address referred to, concludes:

"We lawyers, the inheritors of all John Marshall's wisdom, and, as common countrymen, the beneficiaries of his high judicial ability and his far-seeing statesmanship, are obligated to his memory in a double sum of inextinguishable gratitude. The least we can do is to hearken to the admonition of his genius, which bids us be lawyers, sound constitutional lawyers; and be, as Wirt again said of him while he was still at the Bar, 'A fellow who would not depart one step from the right line of his argument though a Paradise arose to tempt him.' By whatsoever distant shore his great soul tarries, he knows that his countrymen love him. If ever there be a future hour of juridicial crisis in the Republic, we pray the God of Nations to give us another leader like him."

## SHALL THE ADMINISTRATION OF JUSTICE BE THE ACCIDENT OF THE JUDGE OR THE CERTAINTY OF THE SYSTEM?

Having heretofore, discussed the request to be made of Congress, that the federal supreme court be given like power of control and reform over law procedure that it possesses and is exercising over the equity side of the federal courts and the advantages to be derived therefrom, it is in order to briefly consider pleading and procedure. In both a scientific and practical analysis there will be observed certain fundamental principles of more importance than the substantive law itself and that cannot be safely forsaken. Their evolution is the history of the resistance of mankind to tyranny and usurpation by government and other power. These may not be omitted in any system affording an assurance of swift impartial and final administration of justice which will now, with some pains, be endeavored to be shown. A concrete example is the present English system. In it there survives all the merit of the common law with a minimum, if any, of former procedural difficulties.

In order that the thought be placed in concrete form there was offered at the 1910 meeting of the American Bar Association, (Chattanooga, Tenn.), a resolution as follows:

"That in whatever form of pleading that may be adopted, there shall be preserved the common law limitation upon the court, that whatever is not juridically presented cannot be judicially determined."

A report was made upon it at the Boston meeting (1911), by a sub-committee of one

of a special committee, which was merely filed without being considered. It may never become an issue if the federal supreme court be empowered to reform law procedure.

That some effort has been made to contort the very simple definition of this resolution justifies the statement that it means only that the lawyers retained to try a case shall prepare a complete record of the exact issue desired to be joined and heard and that the judge shall not alter it except upon the record upon motion, after sufficient notice and shall be allowed to consider no other. That this prevents surprise or imposition by the judge, the government or one of the parties, by creating a new and unexpected issue; or by further vexation in the future with the same issue and will afford an intelligent review on appeal, will more fully appear in what is to follow. Meanwhile it is well to point out that it comprehends and requires no particular form of pleading but, on the contrary, is best suited to a simplicity that affords no opportunity for subtlety.

It thus appears that it is entirely immaterial in what form or under what name they appear, so that at the trial of the case, a statement of the facts of the cause of action from which the alleged legal liability can be drawn is presented upon a permanent record, for what possible difference can it make to the suitor whether his debtor is proceeded against in "assumpsit," "debt" or "covenant" or any other arbitrary form? It does make a difference, however, that the record shall be reduced to a simple statement of the claim and of the defense, or a defense and counterclaim, with all necessary and liberal amendments. That the doctrine of *res adjudicata* and the protection afforded by due process of law should be preserved, because it is neither just nor honest, nor prudent, that, that which is not presented in the pleadings originally, or by amendment, should be judicially decided. The case at bar should be a thing complete within itself, independent of the court, not only for present, but for future purposes. As a man has the constitutional right to be confronted by his accusers, and to be placed but once in jeopardy upon a clearly defined charge, so has he the inalienable right to be explicitly notified of the *intention, reason and alleged legal right to take his property* as well as his liberty.

Furthermore, and of equal importance, preparing and answering this claim is a lawyer's function, not that of a court. It is inconsistent for a court to act in a dual capacity. For the court to prepare or properly amend a pleading, of his own volition, he must know the litigant's case and must advise him the proper theory to adopt. To know this he must consult the client and interview the witnesses. Both plaintiff and defendant would have the right to require the same service. Having arranged the issues to suit himself he ought to find no trouble in deciding it the same way! Under these conditions what would be the lawyer's duty or function?

Now, as may well be repeated, with strict reference only to enforcing rules of pleading and procedure, the relation of the presiding judge to the litigants and the authorities is analogous to that of an umpire in a game. The lawyer should propose and the court dispose. It is the court's province to administer, not to make rules or law. It would be a dangerous umpire who made his rules as he enforced them, but a very just and safe one who enforced existing rules regardless of his personal inclination or the personnel of the players. Judicial procedure, therefore, must be fixed and established. Subject to neecssary rules of convenience, the great principles entering the warp and woof should be as immutable as the law of the Medes and Persians or the Twelve Tables of the Roman Republic and not personal rules, as was the case during the decadence of the Roman Empire when the pleasure of the Prince had the effect of law. Under that government it was convenient, if not neecssary, for the judge to exercise arbitrary power. The system made this possible in that the

Chief Judge (*Praetor Urbanus*) made up the issues and referred them to the *Judex* for trial.

Briefly stated, "the parties, by their attorneys, should make the record and what is decided within the issue is *res adjudicata;* anything beyond is *coram non judice* and void." The courts should not *ex moru motu* set themselves in motion. Civil liberty and property rights demand this limitation upon courts and government and, further that a court may not act *sua sponte* except to prevent imposition upon its own jurisdiction. Under such a system, the voice of the tyrant or the irresponsible become *obiter dicta* and harmless. On appeal the immateriality and irrelevancy of the evidence and error of decision are self-evident. It is next to impossible for irregularity not to be overtaken by the reviewing court. Pleading, it thus appears, is not mere form. It is the only protection between the citizen and arbitrary power. It represents the very genius of government itself and there is no more striking example than the history of Rome. A weak or subservient judicial procedure has ever been the first symptom of the decline and fall of a government. To the ends of tyranny this is necessary. I am indebted to Mr. Edward D'Arcy, of St. Louis for a reference to 1 Hughes "Grounds and Rudiments of Law":

"Sec. 14g. Fundamental Principles of Government and of Procedure From the Roman.—A study of Roman procedure confirms the statement on this subject which we have quoted from Paul, and shows that they fully understood the importance to a republican government of treating pleadings as the foundation of the action. Under their system of procedure the magistrate organized the suit by delivering to a judex a written formula by which the power of the latter to hear the case was determined. The preparation of this formula, corresponding to our pleadings, was of the greatest moment, and 'the full force of legal science was brought to bear upon it.' (Ortolan, 548). The *intentio,* that is, the part of the formula in which the plaintiff's case was stated, as the 'vital part of the case, and could in no case be dispensed with.' So also, as to the *demonstratio.* (Ib. 549-173). Beyond the terms of the formula delivered to him by the magistrate, the judge was powerless, and the greatest care was exercised by him to confine himself within the limit of the power conferred upon him. (*Ib.* 174-175).

"These formulas or pleadings were strictly adhered to as long as the spirit of freedom lasted in Rome, but with the decline of republican institutions and the substitution of imperial ones they began to disappear. (*Ib.* 287). Here is a much needed lesson for those of our American courts who are inclined to depart from the pleadings. The downfall of the republican form of government at Rome may be dated from the accession of Emperor Diocletian, who reached the throne A. D. 284, after a period of fifty years of confusion in which sixteen emperors had perished. Diocletian openly assumed the power of a despot. We have it on good authority that by the time of Theodosius II, A. D. 440-450, jurisprudence had sunk into abject ignorance and barbarity, (Phillmore's 'Private Law among the Romans', p. 11), and yet the pandects of Justinian, under whom an attempt was made to return to the glory of earlier jurisprudence, contain selections from authors of the time of Diocletian and Theodosius II. It is not strange that an empire which was no longer Roman, but Asiatic (Ortolan, 555), should abandon the formula, and that a weak and degenerate people should be content to have their causes tried before judges appointed by a tyrant and without the security of written pleadings which alone could afford them certainty and protection. If history repeats itself, then it is proper to ask whether the bench and the bar of those states where the 'theory of the case' rule prevails, are not, though innocently, doing their part to lead the country to a fate similar to that of Rome."

In addition, see introduction to Institutes

of Justinian, Sandars 4th edition (1869). At page 63:

"The directions which the magistrate sent to the judge were always conveyed in formal shape, and the word 'formulae' was used to express the different forms in which directions were given. These formulae were preserved and collected, and it became the great object of the contending parties that the right formula should be used in their case, *the judge not being allowed to depart from the instructions* he received."

Also page 54:

"The *intentio* was the really important part of the formula. It was a precise statement of the demand which the plaintiff made against his adversary. (Gaius, IV, 41). It was necessary that it should exactly meet the law which should govern the facts alleged by the plaintiff, if proved," etc.

Also page 66:

"Of course the *intentio* took any form that best suited the case; and it was the intentiones that were so carefully preserved as precedents, and so keenly debated by the contending parties."

Under Lib. Tit. IV, Section 35 of the Institutes, a plaintiff was allowed to amend his formula. This section reads as follows:

"When a plaintiff demands one thing instead of another he incurs no risk. For if he discover the truth, he is allowed to correct his mistake in the same action. As if he should demand the slave Eros instead of Stichus, or should claim as due by virtue of a testament, what is really due upon a stipulation."

*English Pleading.*—Fortunately, there is an example that we would be justified in following. The pleading of England reflects the labor and thought of the greatest lawyers known to history and covers a period of eight hundred years. We took from them the immutable bases of our laws when our forefathers established governments in this country. Shall we now spurn them as unworthy to teach us how to proceed to trial or as being ignorant when they declare that the law can rise no higher than the procedure through which it is enforced? I am willing to concede that Americans are a great people. But, greatness consists in recognizing the good in others and profiting by it. Upon what meat, then, have we fed that we have grown so superlatively great? True, their courts differ from ours but that offers no difficulty to the practical in placing the venue.

*It Prevents Oppression.*—Pleading and procedure as a system is the only restriction and limitation upon the individuality of the judge and the direct interference and oppression of the government or other power. It is a greater protection to civil liberty and property rights than armed intervention. In the shadow of a suspended *habeas corpus* lurks martial law and lies the corpse of free citizenship. Arbitrary power, whether on the bench or in the executive chamber, violates the first principles of a republican government. Unrestricted power, married to human nature, has begotten tyranny, if not corruption, since the beginning of the world. It is as important to have checks and balances upon courts as upon government, for both are conducted by men. We are discussing principles, not incidents. A present absence of evidence of tyranny or corrupt conduct on the bench is no guarantee of the future. For the same reasoning, a ship captain might as well discard his life preservers because of continued fair weather. Indeed, *shall the administration of justice be the accident of the judge or the certainty of the system?* That is the kernal in the nut. That is the true measure of a record pleading—it limits and restricts the issues, perpetuates the procedure, defines upon appeal, the relevant and material and protects from future vexation.

The donning of the ermine takes away none of the human frailties. To err is human. Gratitude, one of the cardinal virtues, may in a judge become a vicious

weakness. A benevolent government today may be a grasping tyrant to-morrow, according to the men at its head. Government is personal and a belief in its infallibility is symptomatic of either imperialism or insanity.

History but repeats itself in the contention for unlimited power in judges that they should not be confined to the decision of the distinct issues, made up and perpetuated in a written record. The founders of the government met and violently dealt with the same uncanny confidence in a personal ego rather than a fixed system. The answer was the adoption of the Tenth Amendment to the Constitution, specifically reserving to the states all power not expressly or by necessary implication granted to the general government. An observation of Thomas Jefferson made at the time, is interesting and illuminating. To the advocate of unlimited judicial power the entire debate is earnestly commended. Said Mr. Jefferson:

"In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

In simple language, the Patriots of 1776 felt the necessity of insuring that *man shall not be exalted above the law.* Are we, of a later generation, so much more patriotic, or so startlingly perfect? In a day of admittedly illegal commercial combinations are we growing morally superhuman? Perish the thought. It is unworthy of serious contemplation. Unlimited power in any branch of government, is inconsistent with the rights of a free and independent people, even though they be perfect. Opportunity for inefficiency and partiality is more to be feared in judicial procedure than corruption. The responsibility and inspiration for the former may be obscured in the meshes of a trial except from unwilling expert eyes. Corruption calls aloud unto all men. It has been a source of evil to the ethical and one of profit to the "supple knee" since the days when the Israelites were laying the foundation of legal history.

"Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil." (Ecclesiastes, 8:11).

*Magistrates' Courts.*—We have been cited by a distinguished educator to well administered justice in magistrates' courts as an argument in favor of abolishing record pleading. In answer to this, let Charles Dickens comment on the immortal "Fang" at the trial of "Oliver Twist":

"Although the presiding genii in such an office as this exercise a summary and arbitrary power over the liberties, the good name, the character, almost the lives, of her majesty's subjects, especially of the poorer class; and tricks are daily played to make the angels blind with weeping, they are closed to the public, save through the medium of the daily press.

Now, let Hon. Andrew A. Bruce, a distinguished member of the American Bar Association, bring them down to date (73 Cent. Law Jour., No. 5, p. 76):

"That the letters 'J. P.' are popularly known to stand for 'Judgment for the Plaintiff,' that the justice has catered for business like any tradesman and has been only too prone to favor the law or business firm that brought it to him."

It is nothing short of sacrilege to classify present English pleading and procedure with magistrates' courts. It is believed to be the ideal system in history. It is as old as English civilization and as new as the most modern idea. It contains no element of experimenting or seeking after innovation or specious technicality or subtlety and is so organized as to protect the individual against arbitrary power and will suit or can easily be made to suit American procedure as well as English. Lest we forget, when the United Colonies met in Congress in 1774, they claimed the common law of England as a branch of those indubitable rights and liberties to which the respective colonies are entitled. "And the

common law, like a silent Providence, is still the preserver of our liberties."

But, as I have sought to imply, without optimism, one can have faith. There is fast being overcome the lack of it and a sort of impatience, not to say intolerance, constantly manifested, which one is constrained to connect with a lack of information of the present burden upon commerce. In the words of James Russell Lowell:

"New times demand new measures and new men;
The world advances and in time outgrows
The laws that in our fathers' day were best;
And, doubtless, after us, some purer scheme
Will be shaped out by wiser men than we,
Made wiser by the steady growth of truth.
The time is ripe, and rotten-ripe, for change;
Then let it come; I have no dread of what
Is called for by the instinct of mankind,
Nor think I that God's work would fall apart
Because we tear a parchment more or less;
Truth is eternal, but her effluence,
With endless change, is fitted to the hour."

THOMAS WALL SHELTON.

Norfolk, Virginia.

## INSURANCE—CANCELLATION OF POLICY.

### GERMAN UNION FIRE INS. CO. OF BALTIMORE v. FRED G. CLARKE CO.

Court of Appeals of Maryland. Dec. 6, 1911.

82 Atl. 974.

A stipulation in a fire policy for cancellation on notice and the return on the surrender of the policy of the unearned premium requires a return or tender of the unearned premium as a condition precedent to the right of insurer to cancel the policy.

STOCKBRIDGE, J.: This case involves no conflict of testimony but raises three questions of law, upon the answer to which its determination depends. The suit is upon an insurance policy to recover the amount named in the policy; a loss having occurred of the property insured.

(1) In the brief and at the oral argument, it was urged on behalf of the company that there could be no recovery, for the reason that the plaintiff had offered no affirmative proof of the payment of the premium, which constituted the consideration for the issuance of the policy. A careful examination of the record fails to disclose that any question of the payment of the premium was raised at the trial of the case below, though the payment of the premium is recited in the declaration to have been made by the plaintiff to the defendant, and the policy offered in evidence recites as the consideration for it "twenty-five dollars premium." This language in the policy and the recital in the declaration, in the absence of any pleading or evidence denying the payment of the premium, might fairly be assumed to be an admission of such payment, if the question were properly before us; but article 5, sec. 9, of the Code, expressly provides that in no case shall this court "decide any point or question which does not plainly appear by the record to have been tried and decided by the court below," and the numerous applications of this provision, of which the case of Baltimore City v. Austin, 95 Md. 93, 51 Atl. 824, is but an illustration, clearly show that this defense to a recovery on the policy, not having been passed upon by the court below, cannot properly be considered upon an appeal.

(2) The ground of defense upon the part of the company is the cancellation of the policy before the loss occurred, and presents two questions. The first of these is whether the notice, as given by the company, was a sufficient notice, and, if not, whether the notice was void in toto, or merely defective with regard to a matter which the period that intervened between the notice and the loss may have cured; and, secondly, whether a return or tender of the pro rata portion of the premium was a prerequisite to a valid cancellation of the policy. The clause providing for cancellation was what is known as the New York standard form, and reads as follows: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If the policy shall be canceled as hereinbefore provided or becomes void or ceases, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal; this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the prorata premium."

The notice in this case bore date July 15, '09, and was as follows: "The German Union Fire Insurance Co. herewith gives five days' formal notice of its intention to cancel policy No. 35069 issued to owner and mortgagee for $1,000, covering property located at 48-54 River street, Cleveland, Ohio, in accordance with the stipulations and provisions embraced in lines Nos. 51 to 55, both inclusive, of the printed conditions of said policy, to-wit." Then follows a transcript of the cancellation clause of

the policy, after which the notice continues: "Please take notice that all liability of said company under said policy will absolutely cease at noon July 20, '09, unless surrender thereof to the company be made sooner, and that the unearned premium due, if any, will be held subject to your order and return of the policy."

This notice was mailed in Baltimore, by registered mail, on the day of its date, July 15, 1909, as appeared from the registration receipt issued by the Baltimore post-office. The return card, showing the receipt of this notice by the addressee, offered in evidence, shows the date of delivery of the notice of cancellation to have been July 17, 1909. The insured, therefore, from the face of the papers, had not five, but three days' notice of the intention of the appellant company to cancel the policy. What happened after that does not very clearly appear from the record, but apparently the policy was canceled at some date, presumably the 20th of July, 1909, upon the records of the company; but no notice of the fact of cancellation was ever communicated to the appellee. In this condition of facts, the relative positions of the parties are well defined by the opinion rendered by this court in the case of the Am. Fire Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373, where, in a similar case, it was said that, "if it shall be canceled by the company, the clause further provides that if the premium has been paid the 'unearned portion shall be returned on surrender of the policy,' etc., 'except that when the policy is canceled by the company by giving notice it shall retain only the pro rata premium.' These are conditions upon which the right of the company to cancel rests; they must be strictly construed and strictly performed. Runkle v. Insurance Co. (C. C.) 6 Fed. 143; Lattan v. Insurance Co., 45 N. J. Law, 453. Five days' notice is therefore a condition precedent. * * * It is clear that the mere service of such a notice as this, if the premium had in fact been paid or the insured was chargeable with its receipt, would not ipso facto work a cancellation. The policy would have to be canceled by the insurer by some act clearly indicating that he had done so; and this act could not be effectually performed under the provisions of the policy until the five days had expired."

In the Brooks Case, the notice was not received by the insured until one day before the time named for cancellation, and it is said that "this was not within the rights reserved in the policy, and was an utterly void act. Had the attempt to cancel been made later on, another question would have arisen, upon which we now have no occasion to comment. No other attempt was made, and what was done was nugatory and void."

This language is equally applicable in every respect with regard to the conditions contained in the policy and the notice given, or attempted to be given, in the case before us, and would of itself be necessarily conclusive of this case, without some evidence tending to show a cancellation in fact, not earlier than July 22, of which the insured had notice, or a waiver upon the part of the insured; and there is no evidence of any such waiver. To effect a valid cancellation of a policy, there must be a present purpose carried out, not a mere intent of future action (Banking Co. v. Insurance Co., 75 Mo. App. 310); or, as was said in Davis Lumber Co. v. Hartford Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131, "there must be an actual notice of cancellation, not a mere notice of a desire to cancel, or a notice that the policy will be cancelled, or a notice to cancel; and the notice must be served on or given to the proper person."

(3) There remains to be considered that which is probably the most important question in the case, to-wit, whether a return or tender of the pro rata part of the premium was a prerequisite to any valid cancellation of the policy. In the very able argument and briefs submitted in this case, practically all of the authorities in this country in any way bearing upon this question have been presented to the court, and those authorities present some divergence of views. The cancellation clause has not been uniform in all policies, and in a number of cases which have passed upon this question the decision was rested upon a precise construction of the particular language of the policy before the court. In so far as the adjudicated cases have dealt with policies where the cancellation clause was different from that in the standard form, they afford but little real assistance upon this question. Reference will be made, therefore, only to cases where the provision for cancellation was identical with that contained in this policy. In the federal courts, there has been a general uniformity of decisions to the effect that the return or tender of the pro rata portion of the premium, where the notice of the cancellation had been given by the company, is not a prerequisite or condition precedent to the termination of the policy, and the same view has been adopted in New Jersey, Iowa, and Michigan. Davidson v. Insurance Co., 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065; Parsons v. Insurance Co., 133 Iowa, 532, 110 N. W. 907; Webb v. Insurance Co., 164 Mich, 139, 129 N. W. 19.

A contrary view was expressed by the Court

of Appeals of New York in the case of Nitsch v. Am. Central Ins. Co., 152 N. Y. 635, 46 N. E. 1149, cited in Davidson v. German Ins. Co., 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 886, 12 Ann. Cas. 1065, and this was followed later by the case of Tisdell v. N. H. Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. This latter case is chiefly noteworthy for the dissenting opinion, filed by Parker, C J., and which dissenting opinion has been the basis of most of the adjudications since, which have taken the view that the return or tender of the pro rata portion of the unearned premium was not a prerequisite to cancellation. The prevailing view in the Tisdell Case, however, that such return or tender was a condition precedent was reaffirmed by a unanimous court in the case of Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N S.) 889; and, while the inferior courts of New York have not always followed those cases, because of some slight variation of phraseology of the cancellation clause, as in the case of Walthar v. Penn. Fire Ins. Co., 2 App Div 328, 37 N. Y. Supp. 857, they have never denied the principle, but have sought to distinguish the cases before them by reason of the varied phraseology.

The conclusion of the New York Court of Appeals, as announced in Tisdell v. N. H. Ins. Co., supra, and reaffirmed in Buckley v. Ins. Co., supra, has been adopted in Davis Lumber Co. v. Insurance Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; Phoenix Assur. Co. v. Manufacturing Co., 92 Tex. 297, 49 S. W. 222; Hartford Ins. Co. v. McKenzie, 70 Ill. App. 619; Hartford Ins. Co. v. Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158; Peterson v. Hartford Ins. Co., 87 Ill. App. 572; Peoria Ins. Co. v. Botto, 47 Ill. 516; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Hollingsworth v. Niagara Ins. Co., 45 Ga. 294, 12 Am. Rep. 579; Taylor v. Insurance Co. of N. Am., 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; Davison v. Insurance Co., 189 Pa. 132, 42 Atl. 2; Hartford Ins. Co. v. Tewes, 132 Ill. App. 321; Williamson v. Warfield, 136 Ill. App. 168; Kinney v. Insurance Co., 141 Ill. App. 543; and the same view is adopted by such text-writers as May, Wood, Joyce, and Cooley.

While some of these cases have been decided by divided courts, nevertheless the great weight of authority is in support of the view that the return or tender of the unearned premium is a condition precedent to the right of cancellation upon the part of the company, with which view we concur. Entertaining this view of the law applicable to the case, it does not seem necessary to consider in detail the several prayers presented to the trial court; and it will be sufficient to say that we find no reversible error in the rulings of the learned judge who heard this case. The judgment will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

NOTE.—*Necessity for Return of Unearned Premium in Cancellation of Policy.*—In addition to the cases cited by the principal case as supporting its construction of the cancellation clause of a standard policy are to be cited Niagara F. Ins. Co. v. Roden, 87 Ala. 311, 5 So. 876, 13 Am. St. Rep. 36; Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144; Indiana Ins. Co. v. Hartwell, 100 Ind. 566; Manlove v. Commercial Mut. F. Ins. Co., 47 Kan. 309, 27 Pac. 979; American F. Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373; Green v. Star F. Ins. Co., 190 Mass. 586, 77 N. E. 649; Bradshaw v. Philadelphia F. Ins. Co., 89 Minn. 334, 94 N. W. 866; Chrisman, etc., Banking Co. v. Hartford F. Ins. Co., 75 Mo. App. 310; German Ins. Co. of Freeport v. Rounds, 35 Neb. 752, 53 N. W. 660; Grant v. Reliance Trust F. Ins. Co., 44 N. C. Q. B. 229. In other words, there seem something like sixteen states construing this standard clause as requiring the return of the unearned premium before cancellation is effected, while there are three states and the federal courts opposed.

A Texas case thus expresses the reasoning for the view of necessity for the return of the premium as a condition precedent to cancellation. "We think that the cancellation clause, taken as a whole, means that when the company elects to cancel the policy it must, upon giving notice of such intention, at the same time return or tender to the insured or his agent the unearned portion of the premium. The latter part of the clause, by providing that the company in such cases 'shall retain only the pro rata premium' clearly implies that the other portion shall be returned; and while it does not in terms declare when the return shall be made, it would be unreasonable and unjust to allow it to cancel its obligation and retain the consideration upon which it was based. It would be equally as unjust and inequitable to require the insured 'to dance attendance at the place of business of an insurance company and await their pleasure,' and probably be put to his action to recover the little sum due him, the cost of which might be greater than the sum due. * * * * It is a well-settled rule in equity that one who seeks to cancel an obligation must tender back the consideration on his bill to cancel, and we see no reason why this rule should not apply in the more summary method of cancellation of the contract by giving notice."

Certainly it would seem to be true that in any cancellation of a contract the party cancelling seems under duty to place himself in the situation where contract relations are completely severed, with no dispute to remain on this score, unless it be clear that it is agreed that something may remain growing out of the antecedent relation afterwards to be adjusted.

In Schwarzchild & Sulzberger Co. v. Phoenix Ins. Co., 124 Fed. 52, 59 C. C. A. 572, an unanimous opinion by second Circuit Court of Appeals,

the court, speaking by Townsend, C. J., says, the contract: "Provides specifically for the absolute cancellation of the policy at any time by the company by giving five days' notice thereof. It further provides in express terms that on surrender of the policy after such cancellation, the unearned premium shall be returned. It is difficult to conceive how language more definite could be employed to show that the right to claim such unearned premium could only accrue after cancellation by the insurer and surrender by the insured."

Of course, the courts have not agreed that the language is definite in the expression of what Judge Townsend says is expressed.

He goes further, however, and says: "In support of its contention, counsel for plaintiff relies upon the case of Tisdell v. The New Hampshire Fire Insurance Company, 155 N. Y. 163, 49 N. E. 114. 40 L. R. A. 765. It is true that in said case the Court of Appeals of the State of New York, by a divided court, held that such repayment was a condition precedent to cancellation. We are not unmindful of the great weight which should ordinarily be given to the decisions of said court, especially upon a question involving the construction of a form of policy fixed by the statute of said state. But in the Tisdell case we are wholly without any sufficient or satisfactory guide as to the process of reasoning by which a majority of the court reached its conclusion. The opinion states that: 'The question presented on this appeal is no longer an open one in this court. It was decided in the case of Nitsch v. American Central Insurance Company, 152 N. Y. 635, 46 N. E. 1149, affirmed in this court without an opinion. The memorandum of the decision in the Nitsch case only shows that it affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court. Reference to 83 Hun. 614, 31 N. Y. Supp. 1131, shows that the General Term wrote no opinion. We are, therefore, without anything in the reports to show what questions were decided, or even what issues were presented. Chief Justice Parker, however, in his dissenting opinion in the Tisdell case, shows that the Court of Appeals was required to affirm a judgment of the General Term in the Nitsch case upon another and unquestioned ground of waiver by defendant. In these circumstances we are unable to accept the conclusions of the Court of Appeals in the Tisdell case."

We do not remember ever before to have seen, where a federal court in a question of a state court construing its own statute, has erected into law a dissenting opinion in that court for the mere reason that it agreed with it—for, after all, that is the gist of what is said. We did not know, that it was ever claimed before, or has been claimed since, that there must be presented to a federal judge, as a reason for him to follow state "construction of a form of policy fixed by the statute of said state," a ruling "satisfactory or sufficient to that judge. Indeed, if this be true, then there is no rule, at all, on the subject that is worth the paper it may be written upon.

In El Paso Reduction Co. v. Hartford Fire Ins. Co., 121 Fed. 937, an oral opinion was delivered by J. B. McPherson, D. J., and to him it seemed clear that "the fact that the unearned portion of the premium had not been returned at that time is, in my judgment, of no importance. The policy expressly provides that the unearned portion of the premium shall be returned 'on surrender of the policy.' * * * The evident purpose of this provision is to compel the actual return of the written instrument, in order, that it may not remain outstanding to be a possible source of future trouble. But, whatever the purpose may have been, there is the plain contract." All of which, as in the opinion in the case next before cited, amounts merely to asseveration. No authority is cited.

There is nothing more than this in the case of Parsons v. Insurance Co., 133 Iowa 532, 110, 907. Thus all the opinion says: "The request is all that is essential to a cancellation, but the policy must be surrendered to secure the return of the unearned premium." In other words, the company owes the former insured the amount of the unearned premium but it tells him he will not pay until he returns to it a worthless paper.

In Webb v. Granite State Fire Ins. Co., 164 Mich. 139, 120 N. W. 19, there is fair argumentation. The court divides the cancellation clause, saying that the words: "This policy shall be cancelled at any time at the request of the insured or by the company, by giving five days' notice of such cancellation," alone provide for the method of cancellation. What follows in the same paragraph is a new sentence, and deals with the rights of the parties after cancellation."

That part is then quoted and it is seen to provide for what shall be done on cancellation, becoming void or ceasing. In either event the unearned portion of the premium having been actually paid, the unearned portion shall be returned on surrender of the policy." Certainly, if a policy becomes void or ceases, possibly from no fault or desire of insured, he ought to be reimbursed whether the policy is surrendered or not.

The court says: "We have no hesitation in holding that the cancellation is complete when the notice provided for by the contract is given, and that thereafter the relation of the parties is changed from that of insurer and insured to that of debtor and creditor."

There is no doubt that such a contract may be made, but it is easy to see how it might be expressed with less ambiguity. It might even be said, that the unearned premium shall be returned within the five days. There is no immediate cancellation, for the policy has five days to run, and in whatever language notice is expressed, it may be thought to express an intention to cancel. At all events, the rule is that any ambiguity is construed, if possible, in favor of the insured.

C.

## HUMOR OF THE LAW.

"He asked me if I loved him," This
To Mabel, said Marie;
"At first I would not answer,
But he squeezed it out of me."

Judge—"Your wife complains that for three years you never spoke to her. What reason can you assign for such conduct?"

Defendant—"I didn't want to interrupt her."

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Assignments**—Fraud.—A party to an action cannot avail himself of fraud practiced on his assignor.—Davis v. McCamman, Mich., 134 N. W. 1028.

2. **Bankruptcy**—Attorney Fee.—An appeal lies from a decree of a federal district court in bankruptcy requiring a bankrupt's attorney to account for a payment received in contemplation of bankruptcy.—In re Raphael, C. C. A., 192 Fed. 874.

3.——Attorney Fees.—Notes of a bankrupt having been placed in the hands of an attorney for collection before maturity, but having been paid in due course of bankruptcy proceedings without suit by the attorneys, the holder was not entitled to any allowance for attorney's fees thereon.—In re Jenkins, U. S. D. C., 192 Fed. 1000.

4.——Equitable Rights.—A trustee in bankruptcy, suing to set aside conveyances by the bankrupt, held required to recognize the equitable rights of the grantees.—Bailey v. Wood, Mass., 97 N. E. 902.

5.——Homestead.—A voidable preference cannot be predicated of a conveyance by a bankrupt of his homestead, exempt under the laws of the state, to a creditor in payment of a debt.—Huntington v. Baskerville, C. C. A., 192 Fed. 813.

6.——Insurance.—Where a bankrupt committed suicide after the filing of the petition against him and before adjudication, his executor was entitled to the proceeds of life insurance policies payable to the bankrupt, on paying their surrender value at the date of filing the petition to the trustee.—In re Judson, C. C. A., 192 Fed. 834.

7.——Notice to Creditor.—A debt was not discharged in bankruptcy where actual notice was not received and schedule of debt was defective.—Kreitlein v. Ferger, Ind., 97 N. E. 819.

8.——Notice to Creditor.—Where creditor has knowledge of bankruptcy proceedings in time to prove his claim, it will be discharged, though he was not designated in the schedule.—Perry Naval Stores Co. v. Caswell, Fla., 57 So. 660.

9.——Plea of.—Defendant, desiring a stay of proceedings because of adjudication or discharge in bankruptcy, held required to plead adjudication or discharge.—McDougal v. Chattanooga Medicine Co., Ga., 73 S. E. 1089.

10.——Plea of.—In an action of trover, wherein bail is required, defendant held not entitled to set up as a defense his discharge in bankruptcy pending the action, though plaintiff elects to take verdict for the damages.—Birmingham Fertilizer Co. v. John A. Cox & Son, Ga., 73 S. E. 1090.

11.——Title of Trustee.—A bankrupt's trustee takes whatever title the bankrupt has in lands which he has not conveyed, or by binding contract agreed to convey, before bankruptcy, and so the bankrupt's later conveyance passes no title.—Wright v. Green, Mo., 144 S. W. 437.

12.——Trustee.—One elected to be trustee in bankruptcy held not to become a trustee in fact until approval of the election.—In re Kellar, C. C. A., 192 Fed. 830.

13.—Waiver.—A bankrupt's creditor does not waive lawful security for his claim by merely accepting additional security—In re Endlar, C. C. A., 192 Fed. 762.

14. **Banks and Banking**—Dishonoring Check.—At common law, substantial damages are recoverable against a banker for dishonoring a check of a depositor where there was money in his hands at the time to meet it.—Siminoff v. Jas. H. Goodman & Co. Bank, Cal. 121 Pac. 939.

15.——Trust Funds.—A bank, receiving deposit in name of an estate, is charged with knowledge of the effect of entries relating to the deposit and knowledge that the administrator's misappropriation would be a breach of trust.—Allen v. Puritan Trust Co., Mass., 97 N. E. 916.

16. **Bills and Notes**—Discontinuance of Suit.—In an action on a joint and several note against all the makers, where plaintiff dismisses as to two of the makers, it discontinues the action as to all.—Springstead v. Crawfordville State Bank, Fla., 57 So. 668.

17.——Printed Signatures.—That the transfers on the back of acceptances sued on were by printed signatures is immaterial, in the absence of evidence that they were not adopted as their genuine signatures by the indorsers.—Midkiff & Caudle v. Johnson County Savings Bank, Tex., 144 S. W. 705.

18. **Cancellation of Instruments**—Privies.—The rule that equity will not set aside a conveyance made for an unlawful purpose applies to the grantor's privies as well as to him.—Lines v. Willey, Ill., 97 N. E. 843.

19. **Carriers of Goods**—Bill of Lading.—Presumption as to ownership of personal property arising from possession of a bill of lading may be explained or rebutted by other evidence showing where the real ownership lies.—Lovell

v. Isidore Newman & Son, C. C. A., 192 Fed. 753.

20.——Compensation.—Common carrier held entitled to reasonable compensation for service, but not necessarily to full return for values used in rendering the service.—State v. Louisville & N. R. Co., Fla., 57 So. 673.

21.——Consignors.—The consignors of a shipment, though not the owners, may maintain an action in their own name for a breach of the contract of shipment.—Gulf C. & S. F. Ry. Co. v. A. B. Patterson & Co., Tex., 144 S. W. 698.

22.——Overcharge.—In an action to recover an overcharge in freight, evidence that defendant railroad company had carried the same kind of freight as lumber in previous years held admissible.—Hardaway v. Southern Ry. Co., S. Car., 73 S. E. 1020.

23. **Carriers of Passengers**—State Regulation.—Safety and comfort of passengers, whether intrastate or interstate, may be provided for by state authority when not in conflict with regulations of Congress, and may not be subordinated to freight traffic.—State v. Louisville & N. R. Co., Fla., 57 So. 673.

24. **Commerce**—Interstate Commerce Commission.—The Interstate Commerce Commission has jurisdiction to determine the distance between points in different states and the fare to be charged.—Lipman v. Atlantic Coast Line R. Co., S. Car., 73 S. E. 1026.

25. **Contracts**—Burden of Proof.—Where a party to a contract is old, feeble, illiterate, or weak-minded, slight circumstances will cast the burden of sustaining the contract on the party asserting its validity.—Ruby v. Ewing, Ind., 97 N. E. 798.

26.——Construction.—An implied contract does not exist where the parties made an express contract.—De Haan's Estate v. De Haan's Estate, Mich., 134 N. W. 983.

27.——Forfeiture.—Courts eagerly take advantage of any circumstances indicating an intention to waive a forfeiture.—Knights of Maccabees of the World v. Pelton, Colo., 121 Pac. 949.

28.——Parties to Action.—Where defendant H., on purchasing community property, agreed with grantor to pay one-half the value thereof to plaintiffs, the heirs of the grantor's deceased wife, plaintiffs were entitled to sue on such promise.—Peters v. Lindsey, Tex., 144 S. W. 694.

29.——Pleading.—Plaintiffs, declaring a special contract and a quantum meruit in action for commissions, but asserting a claim only under the contract, held not entitled to show the value of their services under the quantum meruit.—Lambrecht v. Stoepel Realty Co., Mich., 134 N. W. 977.

30. **Corporations** — Agents. — A corporation may confer authority on an agent, and such agency may be implied.—Cannel Coal Co. v. Luna, Tex., 144 S. W. 721.

31.——Foreign Corporation.—Property of a foreign corporation is subject to the laws of a state in which it does business.—Hyde v. Scott, 133 N. Y. Supp. 904.

32.——Liability of Officer.—Corporate officers held liable for their torts committed in the regular course of their employment, regardless of corporate liability.—Hill v. President & Trustees of Tualatin Academy & Pacific University, Ore., 121 Pac. 901.

33.——Reorganization.—The rights of a subscriber of corporate bonds secured by mortgage are unaffected by a subsequent reorganization of the corporation.—Donnelly v. Missouri-Lincoln Trust Co., Mo., 144 S. W. 388.

34.——Stock Subscription.—A mistake of law furnishes no ground for rescission of a stock subscription agreement.—In re Sharood Shoe Corporation, U. S. D. C., 192 Fed. 945.

35. **Courts**—Jurisdiction.—Where it appears to a court that its judgment is asked in a case which it has no power to decide under any circumstances, it is the duty of the court to repudiate the cause ex mero.—Wolff v. McGaugh, Ala., 57 So. 754.

36. **Creditors' Suit**—Discovery of Assets.—A creditors' bill for the discovery of concealed assets may be maintained, although the property sought to be discovered is outside of the state.—Elliott v. Kyle, Ala., 57 So. 752.

37. **Criminal Law**—Flight.—Flight is evidence of guilt only where the party at the time of his flight, knew he was charged with a crime.—People v. Sainz, Cal., 121 Pac. 922.

38.——Judicial Notice.—Judicial notice is taken that text-books in the Texas public schools impress the idea that alcoholic stimulants are injurious to health and morals.—Ex parte Townsend, Tex., 144 S. W. 628.

39.——Principals and Accessories.—In misdemeanor cases, all parties are principals; there are no accomplices.—Oliver v. State, Tex., 144 S. W. 604.

40. **Customs and Usages**—Test.—Usages of trade are not recognizable in law unless they have the essential elements of certainty, notoriety, and continuity, bringing themselves home to the knowledge of those who are concerned in the trade or business to which they pertain.—Johns v. Jaycox, Wash., 121 Pac. 854.

41. **Damages**—Avoidance of.—Person injured by breach of contract held bound to reasonably exert himself to avoid damages resulting therefrom, unless showing reasonable grounds for his failure to do so.—Hunter v. Southern Ry. Co., S. Car., 73 S. E. 1017.

42. **Death**—Party to Action.—Where the mother was the sole beneficiary of her deceased son, so far as damages recoverable for his wrongful death were concerned, it was immaterial, in the absence of objections in limine, whether she sued as administratrix or individually.—Missouri, K. & T. Ry. Co. v. Wulf, C. C. A., 192 Fed. 919.

43. **Deeds**—Estoppel.—Where parties to a sale of realty have acted for a number of years as if the sale had transferred real rights, they will be estopped from denying such sale.—Chatman v. Bundy, La., 57 So. 786.

44.——Retention of Possession.—If deeds were actually delivered, that grantor retained possession of the property and received the rents during his life would not reinvest him with title.—Lines v. Willey, Ill., 97 N. E. 843.

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